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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. GEORGE UZARGA RODRIGUEZ, Appellant.	2 CA-CR 2010-0028 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20090713-001

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART AND REMANDED

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E S P I N O S A, Judge.

¶1 After a jury trial, George Rodriguez was convicted of aggravated assault with a deadly weapon or dangerous instrument, two counts of aggravated assault of a peace officer, possession of a narcotic drug, and possession of drug paraphernalia. In a subsequent bench trial, he was also convicted of possession of a weapon by a prohibited possessor. The trial court sentenced him to a combination of concurrent and consecutive prison terms totaling thirty-one years. Rodriguez raises a number of issues on appeal. For the following reasons, we affirm in part, vacate in part, and remand this matter for further proceedings.

Factual Background and Procedural History

¶2 "On appeal, we view the facts in the light most favorable to upholding the verdict and resolve all inferences against the defendant." *State v. Klokic*, 219 Ariz. 241, n.1, 196 P.3d 844, 845 n.1 (App. 2008). In February 2009, Tucson Police Officer Vanisi went to a local restaurant to investigate a report about two persons with a gun. Upon entering, a restaurant employee directed him to the restroom area. Vanisi waited outside the restroom and contacted another officer for assistance. When Officer Szelewski arrived, Vanisi began questioning a man who had just come out of the restroom, and Szelewski entered the restroom.

¶3 Szelewski saw Rodriguez washing his hands, identified himself as a police officer, asked to pat him down for weapons, and started touching him around his waistband. Rodriguez, still standing at the sink, swore at Szelewski and said to stop touching him. At that point, Szelewski attempted to grab Rodriguez's wrists in order to

handcuff him, but Rodriguez moved his arms away. Szelewski tried to push Rodriguez up against the wall and began yelling at him to put his hands behind his back and to stop resisting, but Rodriguez continued "[s]truggling and squirming," not allowing himself to be placed in handcuffs. Szelewski then attempted to control Rodriguez with "complying strikes," which included kicks and punches, and continued to yell commands at him.

¶4 Hearing the commotion, Vanisi entered the restroom and attempted to assist Szelewski in handcuffing Rodriguez. Vanisi saw a gun in Rodriguez's hand and struggled for control of it with his left hand while punching Rodriguez in the face with his right hand. During the struggle, Rodriguez waved the gun at the officers' heads while repeatedly trying to pull the trigger, but the gun did not fire. All three men ended up on the floor, with Vanisi and Rodriguez struggling for the gun until Vanisi was able to take it away and handcuff him. Szelewski never saw the gun during the struggle, never saw Rodriguez holding it, and saw it for the first time in Vanisi's possession. Vanisi later observed that the gun had a bullet stuck in its ejection port.

¶5 After the struggle, Vanisi's hand was swollen and his right middle finger was bleeding, and Szelewski had an abrasion on his forehead and minor injuries to his knee. Officers later found a bag of cocaine in one of Rodriguez's pockets. Rodriguez subsequently was charged with one count of attempted first-degree murder, one count of aggravated assault based on the use or threatened use of a deadly weapon or dangerous instrument, two counts of aggravated assault of a peace officer, one count of possession of a deadly weapon by a prohibited possessor, possession of a narcotic drug, and

possession of drug paraphernalia. He was convicted and sentenced as outlined above.[1] We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Duplicitous Indictment and Charges

¶6 Rodriguez argues both the indictment and the charges concerning counts three and four were duplicitous, resulting in fundamental, reversible error due to the danger of a nonunanimous jury verdict. A duplicitous indictment charges two or more offenses in a single count. *State v. Paredes-Solano*, 223 Ariz. 284, ¶ 4, 222 P.3d 900, 903 (App. 2009). A duplicitous charge occurs "[w]hen the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge." *State v. Klokic*, 219 Ariz. 241, ¶ 12, 196 P.3d 844, 847 (App. 2008). The potential problems posed by either error include the risk of a nonunanimous jury verdict. *See id.*

¶7 Because Rodriguez failed to raise these arguments below, he has forfeited the right to seek relief for all but fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). "'To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice.'" *Paredes-Solano*, 223 Ariz. 284, ¶ 8, 222 P.3d at 904, *quoting*

[1]Because the jury was unable to reach a verdict on the offense of attempted first-degree murder, the trial court declared a mistrial as to that count.

Henderson, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. A defendant has the right to a unanimous jury verdict in a criminal case, *see* Ariz. Const. art. II, § 23, and "[a] violation of that right constitutes fundamental error," *State v. Davis*, 206 Ariz. 377, ¶ 64, 79 P.3d 64, 77 (2003). A defendant establishes prejudice by demonstrating that the jury may have reached a nonunanimous verdict. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607; *Paredes-Solano*, 223 Ariz. 284, ¶ 22, 222 P.3d at 907-08.

¶8 Counts three and four of the amended indictment both generally alleged counts of aggravated assault of a peace officer "resulting in any physical injury," with the third count listing Szelewski and the fourth count, Vanisi.[2] Rodriguez argues these counts are duplicitous because, although one element of this offense is an "assault" as defined by A.R.S. § 13-1203, neither count specified the type of criminal assault the state was charging.

¶9 Rodriguez is correct that an element of the offense of aggravated assault of a peace officer is an "assault as prescribed by § 13-1203." A.R.S. § 13-1204(A)(8)(a).[3]

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[2]Significantly, as explained *infra*, both counts three and four failed to allege a predicate assault under A.R.S. § 13-1203, only specifying the incident "result[ed] in any physical injury" to designate a higher class of felony under A.R.S. § 13-1204(D). *See State v. Sanders*, 205 Ariz. 208, ¶ 48, 68 P.3d 434, 445 (App. 2003) (type of assault must be specifically alleged), *overruled in part on other grounds by State v. Freeney*, 223 Ariz. 110, 219 P.3d 1039 (2009).

[3]The other element of aggravated assault of a peace officer is that the person committed the assault "knowing or having reason to know" the victim was a peace officer. § 13-1204(A)(8)(a). As previously noted, the statute provides the offense is designated a higher class of felony if the assault "results in any physical injury" to the peace officer. § 13-1204(D).

Section 13-1203 provides three different methods of committing assault: "[i]ntentionally, knowingly or recklessly causing any physical injury to another person," "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury," or "[k]nowingly touching another person with the intent to injure, insult or provoke such person." § 13-1203(A). Significantly, these three types of assault are separate offenses. *See In re Jeremiah T.*, 212 Ariz. 30, ¶ 12, 126 P.3d 177, 181 (App. 2006) ("[T]he three subsections of § 13-1203(A) are not simply variants of a single, unified offense; they are different crimes."). Therefore, the state must allege the specific type of assault under § 13-1203(A). *See State v. Sanders*, 205 Ariz. 208, ¶ 48, 68 P.3d 434, 445 (App. 2003), *overruled in part on other grounds by State v. Freeney*, 223 Ariz. 110, 219 P.3d 1039 (2009); *see also State v. Kelly*, 149 Ariz. 115, 116-17, 716 P.2d 1052, 1053-54 (App. 1986) (holding indictment duplicitous because it charged defendant with committing single aggravated assault by both pointing rifle at victim and by causing physical injury to victim with knife). Accordingly, because the indictment failed to identify which type of assault formed the predicate for counts three and four, we conclude these counts are duplicitous.

¶10 Although a duplicitous indictment does not necessarily require reversal, *see Paredes-Solano*, 223 Ariz. 284, ¶ 17, 222 P.3d at 906, Rodriguez argues the jury instructions "compounded the error," creating a duplicitous charge. He points out the trial court instructed the jury on all three forms of assault. It also failed to give an instruction regarding the elements of aggravated assault of a peace officer. Rodriguez

argues that because "[t]he three methods of committing assault were given in the disjunctive, with no instruction that the jury had to be unanimous as to which method of assault [he had] committed," there was a "real danger of a nonunanimous verdict."

¶11 The state counters there was no such risk because the trial court's instruction on count two, aggravated assault with a deadly weapon, included only one method of committing assault: "intentionally put[ting] another person in reasonable apprehension of immediate physical injury." It also points to the fact that the three definitions of assault were given as a lesser-included offense to count two and argues "[t]he jury could not have considered the simple assault instruction in reaching its verdict on [counts three and four] because no lesser offenses were alleged for those counts."

¶12 The state ignores, however, that even though the instruction for count two identified only one type of assault, it was not applicable to counts three and four, and there was no similar instruction for the offenses in these counts. Moreover, the jury was instructed not only on all three types of assault, but also was instructed to "consider all of these instructions" and not to "pick out one instruction or part of one and disregard the others." In addition, in closing argument, the prosecutor stated that "for both types of aggravated assault, the first thing you have to have is an assault," which "can [be] commit[ted] . . . in a number of different ways," and then proceeded to describe all three types of assault.[4] Thus, the charges did not cure any error created by the duplicitous

[4]Regarding count two, aggravated assault with a deadly weapon, the prosecutor later clarified that only one method of committing assault applied.

indictment, but rather increased the potential for a nonunanimous verdict. *See Paredes-Solano*, 223 Ariz. 284, ¶ 18, 222 P.3d at 907 (holding error caused by duplicitous indictment "was exacerbated during jury instructions and the state's closing argument").

¶13 When multiple criminal acts are introduced to prove a single charge, "the trial court is normally obliged to take one of two remedial measures to insure that the defendant receives a unanimous jury verdict" by either requiring the state to elect the act it alleges constitutes the crime or instructing the jury that all of its members must agree unanimously on which specific act constituted the crime in order to find guilt. *Klokic*, 219 Ariz. 241, ¶ 14, 196 P.3d at 847. "This is because . . . it is possible for the jury to unanimously agree that the defendant committed the offense charged without unanimously agreeing as to which of the alleged criminal acts the defendant committed to complete the offense." *Id.* ¶ 32. It is undisputed there were no such curative measures in this case.

¶14 Curative measures are unnecessary, however, if "all the separate acts that the State intends to introduce into evidence are part of a single criminal transaction." *Id.* ¶ 15. But a situation cannot be considered a single criminal transaction "if the defendant offers different defenses to each act or there is otherwise a reasonable basis for distinguishing between them." *Id.* ¶ 32. Because Rodriguez's defenses were varied as to the different types of assault, the single criminal transaction theory does not apply. For example, regarding the commission of assault by "[i]ntentionally placing another person in reasonable apprehension of imminent physical injury," Rodriguez's defense was that

he did not point a gun at the officers or pull the trigger and, although Vanisi testified that he did, Szelewski testified he never saw Rodriguez holding the gun. With regard to Vanisi's injuries, which implicated the "[i]ntentionally, knowingly or recklessly causing any physical injury to another person" means of committing assault, Rodriguez had a different defense: that Vanisi had injured his hand by punching Rodriguez, and Rodriguez could not have "assault[ed] [Vanisi's] knuckles with [his] face." Thus, as in *Klokic*, "although some jurors might have dismissed [Rodriguez]'s claims across the board, it is entirely possible that different jurors believed different facts with respect to each of the acts," and therefore "there is a distinct possibility that the jury was not unanimous as to the act or acts that gave rise to [his] criminal liability." *Id.* ¶ 30.

¶15 Moreover, because there was not overwhelming evidence that Rodriguez had committed all three types of assault against each officer, "[n]or was the basis for the jury's verdict otherwise discernable," we are unable to conclude Rodriguez has failed to show prejudice. *Paredes-Solano*, 223 Ariz. 284, ¶ 19, 222 P.3d at 907 ("no basis upon which we could conclude as a matter of law that the jury necessarily reached" conclusion that would demonstrate defendant not prejudiced by duplicitous indictment; testimony "on this issue was, at best, equivocal"); *see also Davis*, 206 Ariz. 377, ¶ 66, 79 P.3d at 77-78 (possibility of nonunanimous jury verdict requires reversal); *cf. Kelly*, 149 Ariz. at 117, 716 P.2d at 1054 (although charge of aggravated assault duplicitous because it alleged defendant assaulted victim in two different ways, defendant failed to show prejudice due to "overwhelming evidence" he assaulted victim in both ways).

¶16 Because the state did not identify in the indictment or elect at trial which acts it regarded as the bases for the underlying crime of assault for counts three and four, because the jury received instruction on all three forms of assault and was not informed it needed to agree unanimously on a specific act that constituted the crime, and because the evidence did not otherwise demonstrate that the basis for the verdict was clear, we must conclude there was a substantial risk of nonunanimous verdicts on counts three and four and that this resulted in fundamental, prejudicial error. *See Paredes-Solano*, 223 Ariz. 284, ¶ 17, 222 P.3d at 906 (holding defendant entitled to reversal under fundamental error standard because he presented different defenses to acts alleged and trial court took no curative measures, resulting in possibility of nonunanimous verdict). We therefore vacate Rodriguez's convictions on those counts and remand them for a new trial.[5]

Denial of Motion for Mistrial

¶17 Rodriguez next argues the trial court erred when it denied his motion for a mistrial based on a comment made by Szelewski during his testimony. On the first day of trial, defense counsel had moved to preclude the reason for the officers' investigation—a report that someone was "waving a gun around at somebody"—and the court apparently granted the motion. During Szelewski's direct examination, he stated that when he had approached Rodriguez in the restroom he "said [he] was looking for an

[5]Because we reverse Rodriguez's convictions on counts three and four, we need not address his argument that his conviction on count four should be reduced from a class 5 felony to a class 6 felony.

individual with a handgun and . . . would just pat [Rodriguez] down to eliminate him as the individual with the handgun." Defense counsel immediately moved for a mistrial. The court denied the motion, explaining that although there was "some prejudice," it was "not sufficient to rise to the level of a mistrial."

¶18 Declaring a mistrial "is the most dramatic remedy for trial error" and should be granted "only when justice will be thwarted if the current jury is allowed to consider the case." *State v. Nordstrom*, 200 Ariz. 229, ¶ 68, 25 P.3d 717, 738 (2001). In determining whether to grant a motion for a mistrial based on a witness's testimony, the trial court must consider: "(1) whether the testimony called to the jurors' attention matters that they would not be justified in considering in reaching their verdict and (2) the probability under the circumstances of the case that the testimony influenced the jurors." *State v. Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d 831, 839 (2003). Because the "trial judge is in the best position to determine whether a particular incident calls for a mistrial," *State v. Williams*, 209 Ariz. 228, ¶ 47, 99 P.3d 43, 54 (App. 2004), we will not reverse absent a clear abuse of discretion, *State v. Slover*, 220 Ariz. 239, ¶ 19, 204 P.3d 1088, 1094 (App. 2009).

¶19 We conclude the trial court did not abuse its discretion because, even assuming the testimony called to the jurors' attention a matter that was inappropriate for them to consider, it is highly improbable that Szelewski's statement influenced their verdict. *See Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d at 839. First, apart from Szelewski's brief comment, neither Szelewski nor Vanisi testified they were investigating a report of

a person with a gun. Thus, the comment was an isolated occurrence. *Cf. State v. Gilfillan*, 196 Ariz. 396, ¶ 38, 998 P.2d 1069, 1079 (App. 2000) (no abuse of discretion in denying mistrial where "testimony consisted of no more than a brief reference to the defendant's request for counsel").

¶20 Second, the comment did not necessarily imply Rodriquez previously had engaged in misconduct. Szelewski stated he was investigating the report of an individual with a gun which, to the extent this could even be considered misconduct, never was connected to Rodriguez. *See, e.g.*, *Lamar*, 205 Ariz. 431, ¶ 42, 72 P.3d at 839 (witness's statement likely did not influence jury because it did "not necessarily implicate [defendant] in the murder and kidnapping"); *see also State v. Herrera*, 203 Ariz. 131, ¶ 6, 51 P.3d 353, 356 (App. 2002) (impermissible testimony "too indefinite to thwart justice"). Accordingly, the cases upon which Rodriguez relies, which dealt with disclosure of a defendant's prior arrest or incarceration, are inapposite. *See State v. Dann*, 205 Ariz. 557, ¶ 40, 74 P.3d 231, 243 (2003) (witness's statement referred to defendant's prior incarceration); *State v. Hoskins*, 199 Ariz. 127, ¶ 54, 14 P.3d 997, 1012 (2000) (statement concerned defendant's prior arrest); *State v. Saenz*, 98 Ariz. 181, 183, 403 P.2d 280, 281 (1965) (testimony referred to defendant's previous acquittal in narcotics case); *State v. Gallagher*, 97 Ariz. 1, 7, 396 P.2d 241, 245 (1964) (suggestion of criminal record), *disapproved on other grounds by State v. Greenawalt*, 128 Ariz. 388, 626 P.2d 118 (1981); *State v. Jacobs*, 94 Ariz. 211, 212, 382 P.2d 683, 684 (1963) (implication defendant previously had been arrested); *State v. Babineaux*, 22 Ariz. App.

322, 324, 526 P.2d 1277, 1279 (1974) (implication of criminal record). We therefore cannot conclude the trial court abused its discretion in denying Rodriguez's motion for a mistrial.

Disclosure of Original Indictment to Jury

¶21 Rodriguez next argues the trial court's inadvertent disclosure to the jury of the original indictment was fundamental, prejudicial error entitling him to a new trial. Before trial, Rodriguez moved to sever the prohibited possessor charge from the other six counts, which the court granted the first day of trial. During jury selection, the court read the six charges to the jury venire, omitting the severed prohibited possessor charge. The jurors then received notebooks containing the preliminary jury instructions and a copy of the original indictment that included the prohibited possessor charge instead of a redacted version. Although the court read the preliminary jury instructions to the jury, it did not read the indictment, explaining, "The first couple pages just recite the charges that have been levied against Mr. Rodriguez. I don't want to read them again, but remind you he pled not guilty to all six of his accusations." Before both opening statements and closing arguments, the court instructed the jury on the elements of the six charges, each time omitting the prohibited possessor charge. At the end of trial, the jurors were supplied with a redacted version of the indictment with their final instructions. Accordingly, the only potential exposure the jurors had to the prohibited possessor charge would have been had they noticed it in their notebooks.

¶22 Because Rodriguez failed to object below, he has forfeited the right to seek relief for all but fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. In order to demonstrate fundamental error, Rodriguez must demonstrate this error "goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id.* ¶ 24. In addition to establishing that fundamental error occurred, he also must demonstrate the error caused him prejudice. *See id.* ¶ 20.

¶23 Even assuming the inadvertent inclusion of the original indictment in the jurors' notebooks could be characterized as fundamental error, we nevertheless conclude Rodriguez has failed to sustain his burden of demonstrating prejudice. "[T]he showing required to establish prejudice . . . differs from case to case," *id.* ¶ 26, and we evaluate the prejudicial effect "in light of the entire record," *State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993); *see also State v. Thomas*, 130 Ariz. 432, 436, 636 P.2d 1214, 1218 (1981) ("If . . . error occurred, the prejudicial nature of the unobjected-to error must be evaluated in light of the entire record.").

¶24 The record establishes the trial court repeatedly informed the jury of the six counts and instructed them on their elements; the prohibited possessor charge never was brought to the jury's attention. Nor was the jury ever instructed to read the copy of the indictment contained in their notebooks. In fact, the court implied the indictment only included the same six counts the court had already read to the jury, explaining it "just recite[s] the charges that have been levied" and "I don't want to read them again, but

remind you he pled not guilty to all six." Additionally, it appears from the record before us that no juror asked about the extra charge in the indictment, nor is there anything in the record establishing or suggesting the jury considered it during deliberations. Accordingly, Rodriguez has failed to establish that he was prejudiced by this inadvertent disclosure. *See State v. Diaz*, 223 Ariz. 358, ¶ 13, 224 P.3d 174, 177 (2010) ("We will not reverse a conviction based on speculation or unsupported inference."); *cf. State v. Hall*, 204 Ariz. 442, ¶ 16, 65 P.3d 90, 95 (2003) (in considering allegations of jury misconduct, prejudice presumed once "defendant shows that the jury has received and considered extrinsic evidence"); *State v. Williams*, 169 Ariz. 376, 380, 819 P.2d 962, 966 (App. 1991) (allegation of improper juror communication during trial did not require new trial when appellant failed to substantiate allegation with affidavits or request juror voir dire).

¶25 Moreover, the trial court instructed the jury that the indictment contained "just accusations," "[wa]s not evidence," and that Rodriguez was not guilty "just because he has been accused." At the close of evidence, the court again instructed the jury that "[y]ou must not think the defendant is guilty just because of these charges." Because we must presume the jury followed its instructions, *see Diaz*, 223 Ariz. 358, ¶ 14, 224 P.3d at 177, we conclude Rodriguez has failed to establish any prejudice on this basis as well.[6]

[6]Additionally, although Rodriguez complains there was no curative instruction given (because neither the parties nor the trial court noticed the error), to the extent the jurors might have noticed the prohibited possessor charge, these instructions informing them the indictment "[w]as not evidence" would have been sufficient to cure the error.

Accordingly, Rodriguez has failed to carry his burden of showing fundamental, prejudicial error occurred here.

Prohibited Possessor Conviction

¶26 Rodriguez argues his conviction for possession of a deadly weapon by a prohibited possessor must be vacated because he was convicted of this offense after a bench trial, despite never having personally waived his right to a jury trial. The state concedes the absence of such a jury waiver requires us to vacate his conviction.

¶27 "'The right to a jury trial is a fundamental right secured to all persons accused of a crime by the Sixth Amendment of the United States Constitution and, in Arizona, by Article [II], [sections] 23 and 24 of the Arizona Constitution.'" *State v. Baker*, 217 Ariz. 118, ¶ 6, 170 P.3d 727, 728-29 (App. 2007), *quoting State v. Butrick*, 113 Ariz. 563, 565, 558 P.2d 908, 910 (1976) (second alteration in *Baker*). "Although some constitutional rights may be waived without actual knowledge of the right involved, the right to a jury trial is a fundamental right and may not be waived without the defendant's knowledge, and absent a voluntary and intelligent waiver." *State v. Ward*, 211 Ariz. 158, ¶ 13, 118 P.3d 1122, 1126-27 (App. 2005) (footnote omitted). Such a waiver "is valid only if the defendant is aware of the right and manifests an intentional

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See Diaz, 223 Ariz. 358, ¶ 14, 224 P.3d at 177 (jury presumed to follow instructions). The jury also was instructed, "You have heard evidence that a witness has previously been convicted of a criminal offense. You may consider this evidence only as it may affect the witness's believability." If the jury noticed the prohibited possessor charge, this instruction would have informed them that Rodriguez's possible prior conviction could be considered only with regard to his credibility.

relinquishment or abandonment of such right." *Baker*, 217 Ariz. 118, ¶ 7, 170 P.3d at 729. A trial court's failure "to notify and explain to a defendant the right to a jury trial and to obtain a knowing, intelligent and voluntary waiver of that right" constitutes structural error. *State v. Le Noble*, 216 Ariz. 180, ¶ 19, 164 P.3d 686, 690 (App. 2007).

¶28 On this record, we conclude that, notwithstanding his failure to object to the bench trial, Rodriguez is entitled to relief because the lack of an appropriate waiver resulted in structural error. Accordingly, we vacate this conviction and sentence and remand the prohibited possessor charge for a new trial.

Consecutive Sentences for Aggravated Assault Convictions[7]

¶29 Finally, Rodriguez argues he should have received concurrent sentences for his convictions for aggravated assault of a peace officer and aggravated assault with a deadly weapon or dangerous instrument because Vanisi was the victim of both counts and the convictions involved the same offense. The state concedes Rodriguez should have received concurrent sentences for these two offenses. However, because we have already vacated both of Rodriguez's convictions for aggravated assault of a peace officer, we need not address this issue.

[7]In his reply brief, Rodriguez withdrew an additional argument concerning the aggravation of his sentences. We therefore do not address this issue.

Disposition

¶30 For the foregoing reasons, Rodriguez's convictions and sentences are affirmed in part and vacated in part, and this matter is remanded for further proceedings consistent with this decision.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge